2004

Robert L. Youngblood, II v. Auto Owners Insurance Company, a corporation : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ROBERT L. YOUNGBLOOD, II,

Plaintiff – Appellant,

v.

AUTO-OWNERS INSURANCE COMPANY, a corporation,

Defendant - Appellee

BRIEF OF DEFENDANT – APPELLEE, AUTO-OWNERS INSURANCE COMPANY

Case No.: 20040184-CA

APPEAL FROM FINAL ORDER (SUMMARY JUDGMENT)
OF THE THIRD JUDICIAL DISTRICT COURT OF
THE SALT LAKE COUNTY, STATE OF UTAH
(HONORABLE WILLIAM B. BOHLING)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

(Cases)

STATEMENT OF JURISDICTION

The Utah Supreme Court, pursuant to UCA §78-2-2(4), poured this case over to this court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Where a written insurance policy clearly provides that underinsured motorist (UIM) coverage only covers an insured when the insured is a motorist who is either in, entering or alighting from a motor vehicle, should a court expand that coverage beyond the unambiguous terms of the policy, to cover the insured when he was a pedestrian?

If an insured desires UIM coverage and receives UIM coverage, should that clear coverage be expanded beyond the unambiguous terms thereof after an accident, especially when the insured had received a copy of the policy but had not read the scope of the UIM coverage?

Where an insurance company, which provided UIM coverage applicable under some circumstances, agrees with its injured insured to waive its subrogation rights to recover PIP payments the insurer made to the insured, from the tortfeasor's insurer, does that estop the injured party's insurance carrier from denying UIM coverage?

Where an insurance company, which provided UIM coverage applicable under some circumstances, at one point states that it will honor a claim, but before the insured relies thereon and takes any adverse action, denies coverage under the unambiguous terms of the policy where it is undisputed that the insured was an uncovered pedestrian

and not a covered motorist, should the insurance company be estopped from its denial of coverage?

Must a court allow additional discovery when it is apparent from the undisputed facts and the law that plaintiff is not entitled to relief, and new facts would not change that conclusion?

STATEMENT OF THE CASE

The Appellant sued the Respondent insurance company for underinsured motorist (UIM) coverage for an accident in which he was a pedestrian, however, the UIM coverage only applied if Respondent was a motorist. The lower court granted summary judgment based upon the unambiguous terms of the insurance policy. Appellant appealed.

STATEMENT OF FACTS

(The Undisputed Facts as to the Accident at Issue)

1. On or about December 30, 1997 the plaintiff was a pedestrian, walking across a parking lot toward a medical plaza, when he was struck by an automobile driven by Rachel Louis Cooksey (hereafter the "Tortfeasor"). See Appellant's brief, Statement of Facts, at 5, para. 1.

2. Confirming that he was a pedestrian, Plaintiff testified as follows:

> " I exited my vehicle and started to walk due east * * * I walked due east toward the west entrance and was approximately half way through the oncoming traffic side of . . . .[the street through the parking lots when the accident occurred].

Plaintiff's deposition at 38, R. at 51 (Emphasis added).

3. In plaintiff's complaint he also admits that he was a pedestrian and that the accident at issue was an auto-pedestrian accident. Plaintiff states:

> "The driver . . . in the aforesaid auto-pedestrian accident was negligent, and . . . sole proximate cause of damages . . . suffered by plaintiff in that auto-pedestrian collision."

Amended Complaint, para. 10, R. at 11. (Emphasis added). See also mention of the auto-pedestrian collision in other paragraphs of the Amended Complaint such as paragraph 12.

4. After having walked across the travel lanes of oncoming and ongoing traffic, plaintiff had almost reached the other side of the traveled street of the parking lot when he was struck by the Tortfeasor. He testified, "I was almost 36 inches from the backside of the parked car on the other side of the street." Plaintiff's deposition, at 39, R. at 50.

5. The "street" in the parking lot which plaintiff had almost completely crossed before the accident occurred was 40 feet wide. The plaintiff had actually measured it as 40 feet. He testified:

> "Q. Can you give me an idea between the distance between the back of your car or these cars that were parked parallel to you -
> A. 40 feet.
> Q. - and the back of the cars that are on the north of his.
> A. I measured it, it's 40 feet.
> Q. So that the actual road way and parking is greater than 40 feet but the distance from car to car is 40 feet.
> A. Correct."

Plaintiff's deposition at 40, R. at 50. (Emphasis added).

(Facts as to the Settlement of Plaintiff's Claim against the Tortfeasor for the policy limits of her insurance)

6. The Tortfeasor, driver of the vehicle at issue, had $50,000 in available liability insurance. Appellant's brief at 5, para. 2.

7. Appellant settled with the Tortfeasor for her policy limits of $50,000. Appellant's brief at 5, paras. 3 and 2.

8. Appellant alleges that his damages exceeded the $50,000 in available insurance from the Tortfeasor. Appellant's brief at 5, para. 4.

9. Prior to settling with the tortfeasor's insurer, Appellant asked Auto-Owners if it would waive its subrogation rights, if any, to ensure that Auto-Owners would not go after any of the tortfeasor's $50,000 in coverage, which Auto-Owners agreed to do, in writing. See the letter confirming Auto-Owner's waiver of rights to go after the tortfeasor, R. at 108.

(The Underinsured Motorist Claim Against this Defendant)

10. The Appellant now claims that the defendant owes to plaintiff underinsured motorist coverage for damages and injuries caused to him which exceeded the available insurance of the Tortfeasor. Amended Complaint, paragraphs 14 and 16, along with paragraph 12. R. at 11-12.

11. Appellant claims he sought UIM coverage and Auto-Owners should be estopped from denying UIM coverage. Appellant's Brief at 1, Issue I, and at 9, Argument V.A.

12. Appellant did receive UIM coverage, just not when he is not a motorist, see paragraphs 18-20, below.

(Facts Regarding the Defendant's Underinsured Motorist Coverage)

13. The Respondent, Auto-Owners, did write an insurance policy to Youngblood Home Improvement Inc., (hereafter referred to as the "Policy"). Appellant's brief at 6 para. 6.

14. The Policy provided underinsured motorist coverage (hereafter UIM coverage) of $300,000 per person. Appellant's brief at 6, para. 5, and R. at 10-11.

15. The appellant asserts that he is covered under the Policy as an owner or officer of Youngblood Home Improvement, Inc. Amended Complaint, paras. 7-9, R. at 10-11.

16. The Auto-Owners' policy contained coverage for certain specifically designated motor vehicles, and UIM coverage if those vehicles were involved in an accident with an underinsured motorist. See paras. 18 and 19, below.

17. The Appellant did not read the Auto Owner's policy to see that the $300,000 in UIM coverage under the Policy covered appellant when he was a motorist but not when he was doing other things such as walking, playing sports, etc. See also Appellant's brief at 8 par. 15; Affidavit of Appellant, para. 3, R. at 105.

(The Undisputed Facts as to the Lack of Coverage Under the Policy for Accidents wherein the Insured is a Pedestrian)

18. The underinsured motorist coverage at issue in the Policy only covers insureds who are "occupying an automobile," that is, one of the vehicles specifically identified in the policy. The underinsured coverage in the Policy states:

> "**2.a. We** will pay compensatory damages any person is legally entitled to recover:

(1) from the owner or operator of an **underinsured automobile**;

(2) for **bodily injury** sustained while **occupying** an **automobile** that is covered by **SECTION II-LIABILITY COVERAGE** of the policy."

Insurance Policy, at page 2, R. at 61. (Bold and caps in the original).

19. The words "occupying an automobile" in the immediately preceding quote with regard to underinsured motorist coverage are defined terms under the Policy. The word "occupying" is defined as follows:

"1. Definitions. The following definitions apply in addition to those contained in **SECTION I-DEFINITIONS** of the policy.

A. **Occupying** means being in or on an **automobile** as a passenger or operator, or being engaged in the immediate acts of entering, boarding or alighting from an **automobile**.

B. Pedestrian means any natural person who is not **occupying** an **automobile**."

Insurance Policy, at page 1 (Bold and caps in the original), R. at 60.

20. Thus, in order to be covered under the UIM coverage under the Policy, the injury must be sustained while the injured party is "occupying an automobile" which means that the injured party must be "in or on an automobile as a passenger or operator or being engaged in the immediate acts of entering, boarding or alighting from an automobile." See para. 19, above. (Emphasis added).

(The Undisputed Facts Regarding Appellant's Claim of Estoppel)

21. On December 30, 1997, Appellant was involved with the accident at issue. Para. 1, above.

22. Appellant negotiated with the tortfeasor's insurance carrier to receive the limits of the tort feasors insurance, $50,000. Amended Complaint, para. 13, R. at 11.

23. Toward the end of those negotiations, Appellant asked the Respondent, who covered the Appellant with PIP and UIM coverage for some circumstances, to waive Respondent's PIP subrogation rights, which it did agree to waive on August 9, 2001. See letter confirming the waiver, R. at 108.

24. In September 2001 Appellant settled with the tortfeasor's carrier for the $50,000 limits of insurance. Amended Complaint, para. 13, R. at 11.

25. On August 9, 2001, Appellant (through his attorney) confirms that Respondent waived it's subrogation rights. R. at 108.

26. On January 5, 2002, a newly assigned claim agent of Respondent wrote that Appellant's claims will be honored. R. at 115. (See correspondence with the prior claims agent, R. at 108, 112).

27. On March 11, 2002, Respondent wrote that there is no UIM coverage because Appellant was a pedestrian and not a motorist at the time of the accident. R. at 116.

28. It is undisputed that between January 5, 2002 and March 11, 2002, Respondent took no adverse action based upon the January 5, 2002 letter; he had settled with the tortfeasor's insurer long before the statement of January 5, 2002 was made, (Para. 24, above) and he had taken no adverse action since.

ARGUMENT

POINT I

AS A MATTER OF LAW THE APPELLANT WAS NOT OCCUPYING AN AUTOMOBILE AT THE TIME OF THE ACCIDENT AT ISSUE, THEREFORE THERE WAS NO UNDERINSURED MOTORIST COVERAGE AVAILABLE TO HIM FROM THE AUTO OWNER'S POLICY

Contract interpretation is a matter of law. For decades, the Courts of Appeals in Utah have held that contract interpretation is a matter of law, not fact. See, for example, *Saunders v. Sharp,* 806 P.2d 198, 200 (Utah 1991) ("Interpretation of a contract is a matter of law for the court to determine, unless the contract is ambiguous and evidence of the parties' intent . . . is necessary to establish the terms of the contract"). See *also Nova Cas. Co. v. Able Constr., Inc.*, 1999 UT 69 ¶ 6, 983 P. 2d 5575 (the existence of ambiguity in a contract is a matter of law).

Insurance contracts are no different. Insurance contracts are the same as other contracts and should be interpreted as a matter of law. See *Prince v. Bear River Mut. Ins. Co.*, 2002 UT. 68 wherein the court stated, ". . . [B]ecause an insurance policy is the contract between the insurer and the insured, we first look to the plain language of the policy to ascertain its meaning if it is not ambiguous. *Id.* at *Holmes Dev, LLC v. Cook*, 2002 UT 38, P24, 48 P.3d 895; *Miller v. USAA, Cas. Ins. Co.*, 2002 Ut 6, P49, 44 P.3d 663." *Id.* at P21. In *Holmes Dev., LLC v. Cook,*, above, the court stated:

> "a title insurance policy like other insurance policies, serves as a contract between the insurer and the insured, and as such 'is subject to the general rules of contract construction.' *Miller v. USAA Cas. Ins. Co.*, . . . [above] (quoting *S.W. Energy Corp v. Cont'l Ins. Co.*,

199 UT. 23, p12 974 P.2d 1239; *Accord First Am. Title Insurance Co. v. JB Ranch, Inc.*, 966 P.2d 834, 836 (Utah 1998)."

Id. at P24. The courts hold that interpretation of an insurance contract is the same as interpretation of any other contract. *Id.* See also *Village Inn Apartments v. State Farm Fire and Cas. Co.,* 790 P.2d 581, 582 (Utah App. 1990), ("Insurance policies are merely contracts and should thus be interpreted under the same rules governing ordinary contracts."); *Alf v. State Farm Fire and Cas. Co.,* 850 P.2d 1272, 1274 (Utah 1993) ("An insurance policy is merely a contract between the insured and the insurer and is construed pursuant to the same rules applied to ordinary contracts.")

Contracts are interpreted using their plain meaning and giving effect to all words. In interpretation of an insurance contract, as any other contract, the commonly accepted meanings of words are considered, and a contract is read as a whole in an attempt to harmonize and give affect to all of the contract provisions. See *Nielsen v. O'Riley*, 848 P.2d 664, 665 (Utah 1992) ("The terms of insurance contracts . . . are to be interpreted in a court with their usual meanings and should be read as a whole, in an attempt to harmonize and give affect to all of the contract provisions.")

Lack of UIM insurance coverage when insured is not a motorist. In the present matter, it is undisputed that the Policy, clearly and unequivocally, without any ambiguity, states that insureds are covered only when they are "occupying an automobile." See FACTS, above, paras. 18-20. The term "occupying an automobile" is clearly and without ambiguity defined as "being in or on an automobile" or " being engaged in the immediate

acts of entering, boarding or alighting from an automobile." See FACTS, above, paragraph 19.

In the present case, it is also clearly and unequivocally undisputed, by Appellant's own admissions in his deposition, in his complaint and in his brief, that he was a pedestrian at the time of the accident at issue, and was not in or on an automobile, nor in the immediate act of entering, boarding or alighting from an automobile. See FACTS, above, paragraphs 1-5.

Appellant had long passed the point of being engaged in immediately alighting from his automobile. He had walked across two lanes of traffic and was almost across the forty foot wide street when he was struck by the Tortfeasor. See FACTS, above, paragraphs 1-5. He was within almost 36 inches of the back of parked cars on the other side of the street from where he parked. See FACTS, above, paragraphs 4 and 5.

Because it is undisputed that the appellant was a pedestrian, and because it is undisputed that the insurance Policy at issue was automobile insurance which does not cover pedestrians, there is no UIM coverage under the Policy and the Respondent was entitled to the summary judgment granted by the trial court.

The courts should not rewrite insurance contracts. See *Alf v. State Farm Fire and Cas. Co.,* 850 P.2nd 1272 wherein the court stated that courts must enforce an unambiguous contract and "may not rewrite an insurance contract." *Id.* at 1275, quoted also in *Utah Farm Bureau Ins. Co. v. Crook,* 1999 UT. 47, P6. In addition, this court has held that insurance coverage may not be so expanded. See Point II, below, the *Perkins* and *Braughon* cases.

No premium was paid by Appellant for the coverage he now seeks. To obtain insurance coverage, a party pays a specific premium for a specific risk or coverage. Premiums are set by actuaries to cover expected claims by all insureds. In the present case, Appellant was charged a premium for $300,000 in UIM coverage, but only for coverage when he was a motorist in or on or alighting from or entering an automobile. The UIM coverage did not cover him when he was, for example, a pedestrian, or a fisherman, or a runner, or a mountain climber. It would be wrong to make the insurance company pay for a risk it did not charge a premium for, and which was never covered.

POINT II

FOR SEVERAL REASONS THE RESPONDENT IS NOT ESTOPPED FROM DENYING COVERAGE

Plaintiff argues that in acquiring the insurance policy and in settling his claims for the policy limits of the tortfeasor's insurance, he relied upon alleged representations that "underinsured motorist benefits would be available to him". Plaintiff's brief at 7-8, para. 13. Appellant asserts that he "was not informed that UIM benefits would not be available to him because this was a corporate policy . . .", Appellant's brief at 8 para. 14. Appellant argues that the Respondent should thus be estopped from denying UIM coverage.

The Respondent should not be estopped from denying coverage for several reasons. First, UIM benefits did cover the Appellant. It is not true that UIM coverage was not part of the insurance in place. The UIM coverage merely didn't cover the insureds as pedestrians, or as players in sport, deep sea divers, etc., as opposed to

motorists. It was not, for example, a homeowner's policy which covers general, non-auto related accidents.

Second, the plain coverage under an insurance policy should not be expanded by easily alleged oral representations of insurance agents. In *Perkins v. Great-West Life Assurance Company, et al*, 814 P.2d 1125 (Utah App. 1991), this court faced an argument that is almost identical to the argument of the Appellant in the case at bar, that is, as a result of equitable estoppel, the plaintiff should be able to obtain coverage which he had never purchased, nor paid a premium for, and which was never contemplated by the insurer in the insurance contract. This Court, however, made quick work of that argument by finding that not only Utah, but the great majority of states will not allow insurance coverage to be increased or expanded beyond that which appears in the policy of insurance, through the doctrine of estoppel. The court stated:

> "The great majority of states dealing with the doctrine of estoppel have held that it cannot be used to bring risks which were not covered by the terms of the policy within coverage of the policy. See e.g., *Farmers Ins. Co. v. Zumsteim,* 138 Ariz. 469, 675 P.2d 729 (Ariz. App. 1983); *Topeka Tent and Awning Co. v. Glen Falls Ins. Co.*, 13 Kan. App. 2d 553, 774 P.2d 984 (1989); *Boyer Metal Fab. Inc. v. Maryland Casualty Co.*, 90 Or. App. 103, 750 P.2d 1195, review denied, 305 Or 672, 757 P.2d 422 (1988); *St. Paul Fire and Maurine Ins. Co. v. Albany County Dis. No. 1,* 763 P.2d 1255 (Wyo. 1988).

Id. at 1131 (Emphasis added). See also the quote from *AIF,* at the end of Point I that the courts, "may not rewrite an insurance contract." *Alf* at 1275.

Third, this position is consistent also with general insurance law that use of parole evidence is not appropriate. The appellate courts in Utah as well as the vast majority of

other courts, clearly hold that a contract of insurance is like any other contract. See Point I, above. As a result, parole evidence will not be used to vary the terms of an insurance contract. See *Braughon v CUNA Mutual Ins. Co.*, 771 P.2d 1105 (Utah App. 1989) wherein this court stated, "if a policy of insurance is clear and unambiguous the words are to be taken and understood in their plain ordinary and popular sense as an average or reasonable person with ordinary understanding would construe them." *Id.* at 1108, quoting *Clark v Prudential Ins Co.*, 204 Kan. 487, 464 P.2d 253, 257 (1970). In the case of insurance contracts, instead of the use of parole evidence to vary the contract, where there is an ambiguity, the ambiguity will merely be resolved in favor of coverage rather than requiring parole evidence. See *American Casualty Co. v. Eagle Star Ins. Co., Limited, Ltd*, P.2d 731 (Utah 1977) wherein the court stated, "If an insurance policy is ambiguous or uncertain, so that it is fairly susceptible to different interpretations, any doubt should be resolved in favor of insurance coverage". *Id.* at 734, cited favorably in *Perkins*, above, 814 P.2d 1129 (Utah App. 1991). Thus where a contract of insurance is concerned one doesn't ever get to parole evidence. If there is no ambiguity, no parole evidence will be allowed. If there is an ambiguity, it is resolved in favor of coverage. Therefore, no parole evidence is needed or allowed. In the present case the language of the policy is not ambiguous, so it controls.

Fourth, appellant argues that an agent of Auto-Owners told him he would have UIM coverage, and he did have UIM coverage as a motorist on business, but not as a pedestrian or recreationist.

Fifth, plaintiff asserts that he was justified in not reading the insurance policy by representations that were made, and thus estoppel should exist to allow plaintiff to have UIM coverage as a pedestrian, even though that coverage was never contemplated in the insurance agreement. See appellant's brief at 8, para. 15. That argument was also dealt with very swiftly and clearly by this court in *Perkins*, above. The court stated that representations are not reasonably relied upon when one has the means to ascertain the actual content of the insurance policy, or the actual truth. The court stated, quoting from two prior Utah cases:

> "'A party claiming an estoppel cannot rely on representations or acts if they are contrary to his knowledge of the truth or if he had the means by which with reasonable diligence he could ascertain the truth.' *Larson v. Wycoff Co.*, 624 P.2d 1151, 1155 (Utah 1981) (citing *Coombs v Ouzounian*, 24 Utah 2d 39, 465 P.2d 356 (1970)).

Id. at 1130. (Emphasis added). The court continued by stating that, "Mrs. Perkins had the means by which she could have ascertained the contents of Great-West's policy." *Id.* The court then indicated that copies of the insurance policy and booklets were available to her. The court then stated that, "given Mrs. Perkins' failure to learn the terms of her insurance policy, her reliance thereon [or alleged representations] was not reasonable." *Id.* (Emphasis added). In the same way, assuming arguendo that some representation was made to the Appellant, taking all facts in a light most favorable to the non-moving party, the Appellant was not reasonable in relying on such alleged representations, to try to vary the contents of the policy. Appellant admits that he did not even read the policy. See appellant's brief at 8, para. 15; FACTS, above, para. 17.

Sixth, the court should not establish a rule or policy whereby any insured, after a non-covered loss or accident, can obtain the benefit of new unintended coverage, for which the insured paid no premium, merely by orally maintaining that she understood she was additionally covered, a very easy allegation to make.

Seventh, the letter which appellant's counsel wrote to Mr. Cramer, an agent of the defendant, at the time of settling his underlying claim, did not talk of Auto Owner's waiving any objection to coverage as appellant now asserts (Appellants brief, argument, Part A.), or waiving any argument that the UIM coverage did not include pedestrian coverage, but only talked of agreeing to waive any subrogation rights which the Respondent would have to recover outlays from the tortfeasor's insurance carrier. For example, in the letter from Appellant's counsel, appellant's counsel writes to Mr. Cramer that he is memorializing his understanding that the defendant "has agreed to waive its subrogation rights . . .". R. at 108. The letter goes on to state, "please acknowledge Auto-Owners' [defendant's] agreement to that waiver by dating and signing this letter in the space provided immediately below." R. at 108. No mention is made of Auto-Owners agreeing to waive argument that no UIM coverage exists when an insured is not a motorist.

Eighth, besides the *Perkins* case mentioned above, general law of estoppel also demonstrates the lack of applicability of estoppel to facts such as those asserted by the appellant. For example, in *Ravarino v. Price*, 260 P.2d 570 (Utah 1953), quoted with approval by later courts as recently as 1999 in *Numley v. Westates Casing Servs. Inc.*, 1999 UT 100, the Supreme Court declared that the doctrine of equitable estoppel only

applies where the alleged representations are as to past or present, not future facts. For example, the court stated, "generally, the doctrine of equitable estoppel is applicable only when a misrepresentation is made as to past or present facts; . . ." *Id.* at 557 (Emphasis added).

In the present case, the plaintiff asserts that an agent of the insurer told him that he would in the future, be covered for UIM coverage if he purchased the insurance. See, for example, Appellant's brief at 7, para. 13, where he states that, "Mr. Youngblood [Appellant] relied, first in purchasing the subject policy of insurance . . ." upon representations of the agent. A representation that a party would be covered in the future is a representation of a future fact which would not come under the general rule of equitable estoppel as mentioned above. The same is true of the second aspect of plaintiff's claim, that he "relied . . . second in settling his claim against the tortfeasor on representations of defendant's agents that the defendant would provide him underinsured motorist coverage . . .". Appellant's Memorandum Opposing Summary Judgment, at 4, paragraph 9, R. at 65. (Emphasis added). Again, this is representation of a future fact where estoppel is generally not applicable.

Respondent admits that under general principles of equitable estoppel, there is an exception for representations of future facts, but only where those facts would constitute a legal waiver of an existing right. The quote from *Ravarino*, in the immediately preceding paragraph, goes on to state, ". . .[A]n exception is recognized when a misrepresentation as to the future operates as an abandonment of an existing right of the

party making the misrepresentation." *Ravarino*, above, at 575. The court then analyzed several cases finding:

> "the common element in these cases is that the promise as to future conduct constitutes a manifestation that the promisor will abandon an existing right which he possesses. It is apparent that an attempt to apply this doctrine to the oral promise of Mr. Price . . . is factually impossible unless the phrase is to be distorted beyond meaning."

Id. at 575. A legal waiver under Utah law, which is necessary for estoppel arising out of representations as to future facts, is very difficult to establish. A waiver must be a very direct, clear expression that a party is aware of a known right and specifically intends to waive that right. In *US Realty 86 Assocs. v. Security Inv. Ltd.,* 2002 UT. 14, the court stated:

> "The legal standard necessary to find waiver is clear. 'Waiver is the intentional relinquishment of a known right. To constitute waiver, there must be an existing right. benefit or advantage, a knowledge of its existence, and an intention to relinquish it.' *Soter's, Inc. v. Deseret Fed. Savs. & Loan Ass'n*, 857 P.2d 935, 942 (Utah 1993) quoting *Phoenix, Inc. v. Health*, 90 Utah 187, 194 (61 P.2d 308, 211-12 (1936))".

Id. at P16. The court went on to indicate that courts must be "especially careful" with regard to questions of waiver "especially where such waiver is merely implied." *Id.*

In the present case, nothing in any of the undisputed facts was a statement that the defendant's agent had actual knowledge that the Appellant was not covered by insurance as a pedestrian, and intended to and intentionally did waive the right to deny coverage in the face of those very provisions in the insured's policy which would disallow such coverage to the plaintiff as a pedestrian.

Ninth, the letter relied upon by the plaintiff, R. at 108, which states that Auto-Owners will waive its subrogation rights, does not even mention waiver of UIM coverage of plaintiff let alone such coverage as a pedestrian. That letter only talks of an agreement to waive subrogation rights. Subrogation rights are the rights of one insurance carrier which pays out more than its fair share, such as in no fault PIP payments, to recover from another insurance carrier or another responsible party such as the tortfeasor. Waiving subrogation rights is only the waiver of rights Respondent would have, to go after the tortfeasor's insurer to recover monies. It has nothing to do with UIM coverage, nothing to do with payment of money to the Appellant, or recovery of money from the Appellant. Thus the letter cannot constitute a waiver of any right to deny coverage to Appellant.

Assuming facts in a light most favorable to the Appellant, a new claim representative, (FACTS, above, para. 26) mistakenly stated in response to a letter from Appellant dated December 21, 2001 on January 5, 2002, that the claim would be honored R. at 115. There is no indication that the agent was aware that the Policy did not cover pedestrian accidents, nor that he was aware that the Appellant was a pedestrian when injured, nor that he nevertheless specifically intended to and did waive Auto Owner's right to assert a lack of coverage, and thereby create new coverage for the Appellant as a pedestrian, for which coverage Appellant had paid no premium. In addition, a review of the January 5, 2002 letter (R. at 115) along with the later letter (R. at 116) demonstrates that at the time of the new claims agent wrote, the only issues was whether the Respondent would entertain the claim because a statute of limitations was at issue. When

the agent stated the claim would be honored, the agent was saying would be honored in light of a possible statute of limitations question.

No adverse action was taken by Appellant as a result of the January 5, 2002 statement. The agent sent the later letter dated March 11, 2003 clearly indicating that the former letter had to do with a statute of limitations issue (R. at 116), thus, at best, the Respondent was waiving a statute of limitations argument. The letter of March 11, 2003 confirms that the defendant will not raise statute of limitations:

> "Be advised that my letter January 5, 2003 referred to the pending statute of limitations issue that was being questioned. We will not raise the statue of limitations as a defense.

R. at 116. The letter goes on to indicate that with regard to other issues, not the statute of limitations, the policy is a business policy not rated for commercial use and that there would be underinsured motorist coverage if the individual person were "occupying the insured vehicle." *Id.* However, this was a pedestrian accident. Under the undisputed facts there is no intentional waiver of the right to argue that there is no coverage, and there was no creation of new coverage thus estoppel with respect to future acts would not apply under general principles of estoppel. This analysis is only added to confirm that even without the *Perkins* case, above, which is controlling and dispositive, even more generalized estoppel principles would bring about the same result.

Tenth, Appellant's reliance in his brief upon a generalized statement in a 1924 case is not controlling over the 1991 *Perkins* case, which is specifically and directly on point. Plaintiff relies upon the *Ellerbeck v. Continental Casualty Co.* case, a 1924 Utah case which states, very generally, that no one shall be permitted to deny that he intended

the natural consequences of his acts when he has induced others to rely thereon, and that such principle is applicable to insurance companies in general. See Appellant's Brief at 10. That is a broad generalized statement, whereas *Perkins*, above, is specifically on point.

In addition, the facts in *Ellerbeck* do not support the application of the quoted statement to the facts at issue. In *Ellerbeck*, an insured asserted that because an insurance company allowed him to make a series of late payments without denying coverage, the coverage could not later be denied when other late payments were made. Immediately after quoting the language upon which plaintiff there relied, the court mentioned the plaintiff's theory and then stated the following: ". . . [T]he theory of plaintiff [is that] receiving the premium after the dates upon which they were due in the years 1920 and 1921 had established a custom or method of doing business that in effect was a waiver of defendant's right to insist upon a literal application of the provisions of the policy . . . There are two reasons why this theory is not tenable: . . ." The court then goes on to indicate that there was no waiver as a result, and plaintiff's theory was not correct.

Eleventh, in addition, the letter of August 2002, wherein Auto-Owners had waived any subrogation rights it may have (R. at 108), was not relied upon by Appellant for anything which damaged the Appellant. Appellant settled with the underlying insurance carrier for the limits of the underlying insurance carrier $50,000. FACTS, above, paras. 6-7. Appellant recovered all he could from the underlying insurer. Waiver of subrogation rights would only mean that Auto-Owners could not try to recover money paid out such as PIP payments to Appellant, from the tortfeasor's insurer. Thus the

waiver merely maximized the return to the Appellant because Auto-Owners could not attempt to recover anything from the tortfeasor's insurer which recovery could reduce the limits of the tortfeasor's insurance available to Appellant in settling with that insurer. Thus there was no detrimental reliance.

Twelfth, there was no detrimental damaging reliance on the letter of January 5, 2002 which stated Auto-Owners would honor Appellant's claim. Appellant's Brief at 7, para. 11. At the time of that letter, Appellant had already, in September 2001, received the full benefit of the underlying insurance limits, so that letter had no effect on Appellant settling his claims. (See FACTS, above, para. 24; Appellant's brief at 6, para. 9) After the letter was received, Appellant took no damaging action. And fairly shortly thereafter Auto-Owners denied coverage by stating that because Appellant was not occupying the insured vehicle there is no coverage, R. at 116. Appellant's brief at 7, para. 12. There was no detrimental reliance by Appellant.

POINT III

THERE IS NO FACTUAL BASIS FOR PLAINTIFF'S CLAIM OF BREACH OF GOOD FAITH AND FAIR DEALING

Plaintiff asserts that material issues exist as to whether or not the defendant breached its duty of good faith and fair dealing. Appellant's brief at 9, para., 2 and at 19-21. The Appellant quotes *Beck v. Farmers Insurance Exchange* with regard to diligently investigating facts, and promptly and reasonably rejecting or settling the claim. See Appellant's brief at 19. The plaintiff's argument fails for several reasons.

First, such claims are not a part of the Amended Complaint of the Appellant. In the Amended Complaint, at paragraph 17, the Appellant does assert that defendant has breached its duty of good faith and fair dealing. R. at 12. Nowhere in the Amended Complaint does the Appellant allege that the breach was because defendant failed to act promptly, nor that it failed to diligently and promptly investigate the claim, nor that the carrier ignored the claim, nor that the carrier failed to act promptly and reasonably in investigating and evaluating the claim. See paragraph 17 and all other paragraphs of the Amended Complaint, R. at 9-13. Instead, the Appellant alleges that the duty of good faith and fair dealing was breached by refusing to cover plaintiff's claim, refusing to offer any money, and by breaching its duty required by the subject insurance policy to pay, etc. But there are no allegations with respect to not meeting that duty by promptly responding to the claim or ignoring the claim. Such allegations are simply not a part of Appellant's complaint.

Second, even if there had been such allegations, under the undisputed facts, there is no prima facia showing of a lack of such prompt action. A letter from plaintiff's attorney, indicates that on August 7, 2001 no settlement of the underlying claim had yet been reached. R. at 107. Underinsured insurance does not even apply until underlying insurance has been fully and completely exhausted, and sometime thereafter it is determined that plaintiff has not been made whole by such exhaustion.

On August 9, 2001, Appellant wrote to the defendant asking him to waive subrogation rights as discussed above. The signature of Auto-Owner's insurance waiving those rights is dated that very same day. R. at 108. The underlying claim was not settled

until September, 2001. See FACTS, above, para. 24. A letter of October 23, 2001 from Appellant's attorney to Auto-Owners Insurance Company, begins with a statement, "thank you for your courtesy in promptly agreeing to waive your company's subrogation claims." R. at 112. (Emphasis added). The letter continues that reports of certain doctors are enclosed, a compilation of healthcare expenses and medical costs are enclosed along with a lot of other documents, and no less than five full depositions. R. at 112-113. Plaintiff's counsel in that letter seeks a copy of the policy language and asks the company, "let me know your company's position on the question of whether Mr. Youngblood is entitled . . . to pursue a jury action . . .". R. at 113.

On January 5, 2002, Auto-Owners writes indicating that plaintiff's counsel was "to compile medical records, bills and reports and submit them to [Auto-Owners] for future consideration". R. at 115. The agent indicates, "my file has been diaried ahead while awaiting the complete documentation requested." R. at 115. Thus, it was some time to be some time after January 5, 2002 that Auto-Owners was to get "the complete documentation," in order to evaluate the claim.

Auto-Owners denied the claim on March 11, 2002, less than two months after the January 5th letter wherein Auto-Owners was still awaiting complete records. R. at 116. Therefore, besides Appellant not pleading dilatory conduct, on the undisputed facts, there is no evidence that such dilatory conduct existed. No prima facia case has been demonstrated by necessary facts, let alone allegations.

POINT IV

FURTHER DISCOVERY WOULD NOT AFFECT THE LOWER COURT'S DECISION BASED ON THE UNDISPUTED FACTS AND ON THE LAW

In the present case, the court had sufficient undisputed facts before it, as stated above, which justified its grant of summary judgment. Those facts included the language of the insurance policy at issue, the facts concerning the settlement with the tortfeasor's carrier, the representations made by the Respondent insurer to the Appellant, the chronology of events, representations by Appellant, actions taken by Respondent, etc. No additional facts would have altered or changed the picture, from which the lower court could decide summary judgment. Further discovery would have simply been superfluous.

CONCLUSION

The Summary Judgment granted below should be affirmed in favor of Respondent.

DATED this 14th day of July, 2004.

KIRTON & McCONKIE

ROBERT R. WALLACE
Attorney for Defendant – Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of July, 2004, I caused two true and correct copies of the foregoing REPLY BRIEF OF DEFENDANT-APPELLEE AUTO-OWNERS INSURANCE COMPANY to be mailed to the following:

Peter C. Collins
623 East 2100 South
Salt Lake City, Utah 84106

Raquel Ferguson